GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Doctors Council of the District of Columbia General Hospital,	
Complainant,	
v.	PERB Case No. 97-U-25
	Opinion No. 800
District of Columbia General Hospital,	
and	
Health and Hospital Public Benefit Corporation,	
Respondents.	

DECISION AND ORDER

This matter comes before the Public Employee Relations Board ("Board") on remand from the District of Columbia Court of Appeals by Order dated January 20, 2004. *Doctors Council of the District of Columbia General Hospital v. District of Columbia Public Employee Relations Board, et al.*, No. 02-CV-1255. The Doctors Council of D.C. General Hospital ("DCDCGH") filed an appeal with the Court of Appeals challenging the ruling of the Superior Court of the District of Columbia which affirmed the Board's Decision and Order in *Doctors Council of the District of Columbia General Hospital v. District of Columbia General Hospital, and Health and Hospital Public Benefit Corporation*, 45 DCR 3999, Slip Opinion No. 539, PERB Case No. 97-U-25 (1998). Specifically, DCDCGH has asserted that the Board cannot reconcile its Opinion No. 539 with its conclusions in Slip Opinion Nos. 525 and 604.

By its Order, the Court of Appeals directed the Board to issue a revised opinion which would provide clarification and explanation of the two questions listed below regarding the underlying facts

in each case. The Board respectfully responds as follows:

> 1) Is the DCDCGH/DCGH compensation agreement discussed in *DCDCGH v. DCGH & PBC*, PERB Case No. 97-U-25 (Opinion . 539), the same as that discussed in *PBC et al.*, PERB Case Nos. 97-UM-05, 97-CU-02 and 99-U-02 (Opinion 604)? If so, is the date on which that agreement was reached mid-September 1996, or a date after the October 1, 1996, transfer of medical officers to the PBC? If two different compensation agreements are involved, what are the dates on which those respective agreements were reached or initiated?

We find that the answer to this first question is "no". Specifically, the factual record upon which the Board based its conclusions in Slip Op. No. 604 has no legal relevance to the administrative record before the Board in Slip Op. No. 539, and the certified record of the Board's proceedings which is on appeal before the Court. Furthermore, we believe that the two cases are factually and legally distinct and were decided, as required by law, on the basis of their separate, and different, administrative records.

The administrative record in PERB Case No. 97-U-25, concluded with the issuance of the Hearing Examiner's Report and Recommendation, on December 5, 1997, and the only evidence concerning the discussions between the parties regarding a compensation agreement are as follows. First, Dr. Kenneth Dais, the president of DCDCGH, offered the following testimony:

> Q Have you demanded equal pay for your members to the clinic doctors? Have you made this demand of the D.C. General Hospital management since the clinic doctors came under D.C. General Hospital employment?
>
> A Yes, we have, on numerous occasions. And in fact, once the rumor came out in September of '96, we made demands that there should be, at a minimum, equal compensation for physicians in the hospital providing acute care versus those physicians in a clinic, who basically provided only eight hours of care per day in a clinic environment.

(Tr. at 64.)

DCDCGH maintained in the proceedings before the PERB that the new labor agreement was signed in late January 1997. (R. at 425.) The agreement was tentative until signed by the parties in late January 1997. (See R. at 425, citing Tr. at 116-119).) Dr. Dais explained further:

Q Now, moving to the efforts to get a new contract, did complainant council and hospital management reach agreement in January of this year [1997] on a new contract?
A We reached a tentative agreement, yes, we did.
Q What – well, let me ask you, what was the content of that agreement relative to the pay [parity] issue?
A The content of the agreement is that basically, the physicians at the hospital would receive pay [parity] with physicians in the clinics.
Q As of when?
A As of January 1, 1997.

(R. at 214-15 (emphasis added).)

THE HEARING EXAMINER: Let me ask you, before we go any further, you referred to this as a tentative agreement. Could you explain what was tentative about it? I mean, when you refer to it as "tentative," what do you mean?
THE WITNESS: Well, initially – until we signed it, it was a tentative agreement.
BY MR. LEVINSON: (Resuming)
Q When did you sign it?
A We signed off initially in late January of 1997.
THE HEARING EXAMINER: In other words, the tentative agreement – well, it's tentative upon approval from the Mayor and the City Council, right?
THE WITNESS: And the Control Board.
THE HEARING EXAMINER: So you're saying that the agreement – you entered into this agreement subject to approval by the union and approval by the necessary powers that be in the D.C. Government?
THE WITNESS: That's correct.
BY MR. LEVINSON: (Resuming)
Q Is there some obligation of the hospital to get that approval once they've agreed with the complainant council on the contract terms?
A The hospital has the full obligation to take the agreed upon contract to the respective – the Mayor's Office, the City Council and the Control Board.
Q So after you signed for the council at the end of January, was this agreement as between the council and the hospital?
A That was our final agreement between the hospital and the Doctors' Council of D.C. General Hospital.

(R. at 216-17 (emphasis added).)

DCDCGH did not allege, and the Board accordingly did not consider, that any enforceable parity agreement predated the October 1, 1996 transfer of medical officers to the PBC. Rather,

DCDCGH maintained that it signed a distinct "new labor agreement" in "late January 1997," which it sought to enforce. (CR at 380 (Brief to the Hearing Examiner for DCDCGH).)

The evidence presented by DCDCGH in the administrative record before the Board in Slip Op. No. 539, which record is the only record before the Court of Appeals, plainly established the date of the agreement as January 1997.

Contrary to the record developed by DCDCGH, in PERB Case Nos. 97-UM-05, 97-CU-02 and 99-U-02 (Slip Op. No. 604), and while the Board's Opinion Number 539 was on appeal to the Superior Court of the District of Columbia, the parties elected to stipulate that the disputed wage increase agreement "was reached by mid-September 1996." Slip Op. No. 604 at 6. As a result of the stipulation by the parties, the date of the agreement was not contested in the proceedings leading to Opinion No. 604. The Board's conclusion, therefore, in Opinion No. 604, that the agreement was reached by mid-September 1996, was only, as the Board notes, "based on a signed stipulation by the parties." *Id.* at 7. Significantly, "the Hearing Examiner found the mid-September 1996 agreement *to be separate and apart from* a subsequent effort by DCDCGH to negotiate with DCGH over a compensation agreement" in January 1997. *Id.* (emphasis added). Neither the underlying administrative record for Opinion No.604, nor the parties reasons for the stipulation are before the Court of Appeals in this case.

Fundamental principles of procedural fairness call for the Board to ground its decision on the factual and legal contentions made by the parties. *See Elliott v. District of Columbia Department of Corrections*, 43 DCR 2940, Slip Op. No. 455 at p. 2, PERB Case No. 95-U-09 (1995) ("Permitting the submission of post-hearing evidence by the Complainant would unfairly prejudice the Respondent by denying it an opportunity to cross-examine the evidence."). Under the Board's rules, the parties play an essential role in defining the issues before the Board and creating the administrative record. Indeed, the Board has recognized precisely this point in *Washington Teachers' Union, Local 6, AFL-CIO v. District of Columbia Public Schools*, 42 DCR 3426, Slip Op. No. 329, PERB Case No. 90-U-28 (1992), in which the Board held that, "The issues in any unfair labor practice proceeding are not determined by the Hearing Examiner but by the allegations made by the Complaint."

The corollary to the parties' significant freedom of opportunity to define the issues and create the administrative record is the stringency with which the Board reviews efforts to reopen the record once it is closed. For example, in *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections*, 49 DCR 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002), one of the Union's exceptions to the Hearing Examiner's Report and Recommendation essentially sought to reopen the record to provide additional facts to support an argument neither alleged in the underlying Complaint, nor argued at the hearing. In rejecting that "exception," the Board held that the Union was "seeking to provide the Board with additional evidence to support allegations not made in the consolidated complaint or at the hearing.

Consistent with *Elliot [supra]*, we deny [the Union's attempt to introduce new allegations." *Id.*, Slip Op. at 13.

Moreover, significant opportunity exists for a party to file exceptions to a Hearing Examiner's report and recommendation, and to file a motion for reconsideration in the event a party concludes that either the Hearing Examiner or the Board has misapprehended any fact or contention material to its case. *See* PERB Rules 556.3 (Exceptions) and 559.2 (Motions for Reconsideration).

The standard of judicial review is fully consistent with these principles, requiring the Court of Appeals to confine its review of the case to matters of administrative record. *See Fraternal Order of Police MPD Labor Committee v. Public Employee Relations Board*, 516 A.2d 501, 505 (D.C. 1986) (the Court "*must examine the administrative record* to determine whether there has been procedural error, whether there is substantial evidence in the record to support the [Board's] findings, or whether the [Board's] action was in some manner arbitrary, capricious, or an abuse of discretion." (emphasis added, citations omitted). In so holding, the Court also noted that the Superior Court is without jurisdiction to consider issues on appeal that were not raised with the Board. *Id.* at n.5. Specifically, the Superior Court "is required to base its consideration of [a] petition 'exclusively upon the administrative record.'" *Gardner v. District of Columbia Public Employee Relations Board*, Civil Action 02-MP-4, Slip Op. at 3 (2003) (quoting Rule 1(g) of the Superior Court Rules of Agency Review).

In this case, the changed strategy of DCDCGH, including the effort to supplement the record *at oral argument* before the Court of Appeals is impermissible. On the administrative record, and consistent with DCDCGH's position underlying Opinion Number 539, the date of the agreement was January 1997, a date after the October 1, 1996 transfer of medical officers to the PBC.

> 2) If the DCDCGH/DCGH agreement is the same one discussed in both cases, should the legal conclusion in both cases be the same with respect to its binding effect? If the answer is yes, is the DCDCGH entitled to any compensation in this case?

We believe that PERB Case No. 97-U-25 (Slip Op. No. 539) was properly decided based upon the administrative record before the Board, and necessarily without reference to factual allegations raised later in connection with a subsequent case. DCDCGH's characterization of uncontested, stipulated facts in connection with Opinion Number 604 has no legal relevance to the Board's decision in Opinion Number 539.

Also, DCDCGH filed a document styled "Post-Remand Brief on Behalf of Doctors Council of District of Columbia General Hospital." In this pleading, DCDCGH sets forth its position concerning the two questions raised by the Court of Appeals and has requested that it be allowed to

present oral argument before the Board regarding the two questions presented by the Court of Appeals. As noted above, the Board has responded to the two questions presented by the Court of Appeals. As a result, we find that it is not necessary to hold an oral argument in order to respond to the two questions. Therefore, DCDCGH's request for oral argument is denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

July 29, 2005.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 97-U-25 was transmitted via Fax and U.S. Mail to the following parties on this the 29 th day of July 2005.

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